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No. 91-969

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL H. ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied a fair trial because of improper attempts to select the judge who presided at petitioner's court-martial and because of an ex parte contact between a government lawyer and the trial judge.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-18a, is reported at 33 M.J. 209. The opinions of the Navy-Marine Corps Court of Military Review, Pet. App. 1b-129b and 1c-7c, are reported at 31 M.J. 572 and 28 M.J. 610.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 18, 1991. The petition for a writ of certiorari was filed on December 18, 1991, and is therefore out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner was convicted by a general court-martial of seven specifications of violating national security regulations, in violation of Article 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, two specifications of espionage in violation of Article 106a, UCMJ, 10 U.S.C. 906a, and one specification of espionage in violation of the federal espionage statute, 18 U.S.C. 793(d), which is made applicable to the military by Article 134 of the UCMJ, 10 U.S.C. 934. He was sentenced to eight years' confinement and a $10,000 fine. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review, sitting en banc, affirmed. The Court of Military Appeals granted discretionary review and affirmed.

1. Petitioner was employed as a clerk at the Subic Bay Naval Telecommunications Command Center in the Philippines. His responsibilities there included routing electronically transmitted messages, some of which were classified. After receiving tips from petitioner's co-workers about his unusual work habits, the Naval Investigation Service began monitoring his activities. Their investigation revealed that he was leaking classified documents and information to officials in the Philippine government. Pet. App. 4b-6b.

2. Prior to petitioner's trial, Captain Powell, the Staff Judge Advocate of the convening authority, telephoned Rear Admiral Slater, the Deputy Judge Advocate General of the Navy. During the conversation, Captain Powell commented that Judge Reed, the anticipated trial judge in petitioner's case, was a "lenient sentencer." Pet. App. 4a, 37b. Admiral Slater then telephoned Captain Byrne, the Navy's Chief Trial Judge, and relayed that concern. Chief

Judge Byrne stated in a subsequent interrogatory that he considered the call from Admiral Slater to be "highly inappropriate." Pet. App. 4a.

During this period, Chief Judge Byrne was developing a centralized system for the assignment of trial judges in national security cases. His proposed plan was eventually approved by the Acting Secretary of the Navy. In accordance with the new procedures, he detailed Judge Roberts to preside over four pending national security cases, including petitioner's. He also designated two other judges as substitutes in the event that a conflict occurred. Pet. App. 4a-5a, 38b.

Judge Roberts heard two preliminary motions in petitioner's case, granting one and denying the other. Pet. App. 7a. Soon after he made those rulings, however, it became apparent that a scheduling conflict would prevent him from sitting on all four cases. Pet. App. 5a, 38b. Chief Judge Byrne therefore removed Judge Roberts from petitioner's case and detailed him to another case from that group, which he viewed as "the more significant of the two cases from a national security standpoint." Pet. App. 38b. Chief Judge Byrne then assigned Judge Reed (the perceived "lenient sentencer") to preside over petitioner's trial. Pet. App. 5a, 38b.

Shortly after the change in assignments, Captain Powell telephoned Judge Reed and urged him to adhere to the trial schedule in petitioner's case, citing the costs entailed by a delay. Pet. App. 8a, 38b-39b, 43b-44b. After instructing Captain Powell to raise the issue with trial counsel, Judge Reed promptly terminated the conversation. Pet. App. 9a, 44b, 50b-51b. Judge Reed disclosed the details of the conversation to petitioner and the government at a pretrial hearing. Pet. App. 9a, 38b-39b, 51b.

Petitioner moved to disqualify Judge Reed based on the ex parte communication. Pet. App. 8a-9a, 41b. Petitioner also questioned whether Judge Reed could be impartial despite the earlier attacks on his leniency and the apparent attempt to unseat him. Pet. App. 7a, 44b-45b, 62b-63b.[1] Judge Reed responded that he remained sure of his ability to be fair and impartial, and he declined to recuse himself. Pet. App. 9a, 39b, 44b-45b, 62b-63b. He presided over the court-martial, and petitioner was convicted.

3. In the Navy-Marine Corps Court of Military Review, petitioner argued that the phone calls from Captain Powell to Admiral Slater and from Admiral Slater to Chief Judge Byrne, concerning Judge Reed's reputation as a lenient sentencer, constituted an attempt to influence the selection of the trial judge in his case, in violation of Article 37, UCMJ, 10 U.S.C. 837.[2] Based on Article 37, petitioner claimed that unlawful command influence occurred a second time when Captain Powell urged Judge Reed to quicken the disposition of his pending trial.

After an extensive review of facts, the court of military review concluded that there had been no unlawful command influence on Chief Judge Byrne

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[1] Judge Reed was unaware of those incidents until petitioner mentioned them. Pet. App. 7a.

[2] Article 37, UCMJ, 10 U.S.C. 837, prohibits what is known in military law as "unlawful command influence." It provides in relevant part as follows:

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

or Judge Reed, and that Judge Reed had remained impartial throughout the proceedings. Pet. App. 6b-7b, 36b-41b. In addition, the court determined that there was not even the appearance of unlawful command influence. Pet. App. 41b.[3] The court went on to conclude that, even if there was unlawful command influence, it was harmless beyond a reasonable doubt. *Ibid.* The court therefore upheld petitioner's convictions. Pet. App. 129b.

4. The Court of Military Appeals granted review and affirmed. Pet. App. 1a-18a. Like the court of military review, it decided there had been no unlawful command influence. Pet. App. 8a. With regard to the telephone calls placed by Captain Powell and Admiral Slater, the court found, Pet. App. 7a-8a (citations omitted):

> In this case, it is apparent that command influence did not prejudice any judicial rulings. Judge Roberts heard two motions before being replaced by Judge Reed. The first sought funds for the defense team to travel to the Western Pacific Area, which he granted. The second sought relief from the conditions of pretrial confinement which was denied.. When it was relitigated before Judge Reed, it was again denied. The rulings of Judge Reed have been reviewed by the Court of Military Review and evaluated in [petitioner's] petition for grant of review, and they have been found not to warrant relief.

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[3] The military courts have interpreted Article 37 as forbidding even the appearance of unlawful command influence. See *United States* v. *Rosser*, 6 M.J. 267, 271 (C.M.A. 1979); *United States* v. *Cruz*, 20 M.J. 873, 880-882 (A.C.M.R. 1985), aff'd in relevant part and rev'd in part not relevant, 25 M.J. 326 (C.M.A. 1987).

> Assuming that the actions of the senior officers amounted to an attempt to influence the detail of the military judge and thus unlawfully manipulate the result of this trial, it is clear that it failed. Judge Reed, of course, sat as the military judge. Further, with the exception of one issue, he was not even aware of these matters until the issue was raised before him at trial. Therefore, we are satisfied beyond a reasonable doubt that neither the criticism of sentences adjudged by him nor the attempt to prevent him from sitting in this case caused him to violate his oath to perform his duties in an impartial manner. [Petitioner's] assertions of unlawful command influence in this case must fail.

On the subject of Captain Powell's ex parte communication with Judge Reed, the court concluded, *id.* at 9a:

> We agree with Senior Judge Albertson of the Court of Military Review that this telephone conversation was "clearly inappropriate" and that Judge Reed handled the matter correctly by terminating the conversation and reminding Captain Powell to address such concerns to trial counsel. Further, by informing the parties and allowing *voir dire* on the issue, Judge Reed eliminated the possibility of creating the misperception that he might not be impartial.

The court therefore upheld petitioner's convictions based on its finding that there had been no unlawful command influence, and that even if there had been, Judge Reed's neutrality was never in doubt.

ARGUMENT

Petitioner maintains that he was denied a fair trial by two actions taken by the government: (1) the government's efforts to prevent Judge Reed from serving as the trial judge in petitioner's court-martial, and (2) the ex parte conversations between Captain Powell and Judge Reed. Neither claim warrants review by this Court.

1. Petitioner does not suggest that Judge Reed was actually biased against him. Instead, petitioner appears to claim that the mere attempt by Captain Powell and Admiral Slater to manipulate the selection of his trial judge requires reversal, even if he was not prejudiced in any way by having Judge Reed preside over his court-martial. That argument lacks merit.

An impartial judge is essential to a fair trial.[4] At the same time, a defendant has no right to have a particular judge preside over his trial[5] or to have

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[4] See, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510, 531-532 (1927); *In Re Murchison*, 349 U.S. 133, 136 (1955); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972).

[5] See, *e.g.*, *United States* v. *Arache*, 946 F.2d 129, 140 (1st Cir. 1991); *Cruz* v. *Abbate*, 812 F.2d 571, 574 (9th Cir. 1987); *United States* v. *Gallo*, 763 F.2d 1504, 1532 (6th Cir. 1985), cert. denied, 474 U.S. 1068 (1986); *Sinito* v. *United States*, 750 F.2d 512, 515 (6th Cir. 1984); *United States* v. *Radlick*, 581 F.2d 225, 230 (9th Cir. 1978); *United States* v. *Braasch*, 505 F.2d 139, 147 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); *United States* v. *Stone*, 411 F.2d 597, 598 (5th Cir. 1969); *Hvass* v. *Graven*, 257 F.2d 1, 5 (8th Cir.), cert. denied, 358 U.S. 835 (1958); *United States* v. *Keane*, 375 F. Supp. 1201, 1204 (N.D. Ill. 1974), aff'd in relevant part, 522 F.2d 534, 557 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976).

the trial judge selected randomly.[6] Moreover, even if there is an irregularity in the assignment of the trial judge, a defendant must demonstrate some resulting prejudice in order to establish that he was denied a fair trial.[7] In sum, due process does not require that any effort to influence the selection of

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[6] See, *e.g.*, *Gallo*, 763 F.2d at 1532; *Sinito*, 750 F.2d at 515; *United States* v. *Simmons*, 476 F.2d 33, 35 (9th Cir. 1973); *United States ex rel. Monty* v. *McQuillan*, 385 F. Supp. 1308, 1311 (E.D.N.Y. 1974), aff'd mem. without opinion, 516 F.2d 897 (2d Cir. 1975); *Keane*, 375 F. Supp. at 1204.

[7] See, *e.g.*, *United States* v. *Berberian*, 851 F.2d 236, 240 (9th Cir. 1988), cert. denied, 489 U.S. 1096 (1989); *United States* v. *Bowers*, 828 F.2d 1169, 1177 n.2 (6th Cir. 1987), cert. denied, 486 U.S. 1006 (1988); *Gallo*, 763 F.2d at 1532; *United States* v. *DeLuca*, 692 F.2d 1277, 1281 (9th Cir. 1982); *United States* v. *Allen*, 675 F.2d 1373, 1385 (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981); *Radlick*, 581 F.2d at 230; *United States* v. *Torbert*, 496 F.2d 154, 157 (9th Cir.), cert. denied, 419 U.S. 857 (1974); *United States* v. *Simmons*, 476 F.2d at 35; *United States* v. *Dichiarinte*, 385 F.2d 333, 337 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968); *Levine* v. *United States*, 182 F.2d 556, 559 (8th Cir. 1950), cert. denied, 340 U.S. 921 (1951); *United States* v. *International Brotherhood of Teamsters*, 697 F. Supp. 710, 713 (S.D.N.Y. 1988). Cf. *Mu'Min* v. *Virginia*, 111 S. Ct. 1899 (1991) (adverse pretrial publicity does not justify a presumption that a juror who has heard of the case cannot be impartial).

Petitioner's reliance, see Pet. 9-10, on *Liljeberg* v. *Health Servics Acquisition Corp.*, 486 U.S. 847 (1988), is misplaced. *Liljeberg* involved a violation of 28 U.S.C. 455(a), which requires federal judges to disqualify themselves from proceedings in which their "impartiality might reasonably be questioned." That statute is not at issue in this case. Moreover, the Court concluded in *Liljeberg* that the district judge's fiduciary interest in the litigation over which he presided justified vacating the judgment he rendered in the case. 486 U.S. at 867-868. By contrast, Judge Reed had no financial or other interest in the outcome of petitioner's court-martial.

the trial judge—regardless of how limited and how fruitless—entitles the defendant to a new trial.

The decision in this case is consistent with those principles. The military courts have ruled that attempts to engage in unlawful command influence can be found harmless beyond a reasonable doubt under the harmless error standard adopted in *Chapman* v. *California*, 386 U.S. 18 (1967),[8] and the military appellate courts in this case undertook an analysis of the record to determine whether petitioner was prejudiced. After conducting a searching review of the facts underlying petitioner's claim, the military appellate courts determined that Judge Reed remained impartial throughout the proceedings despite the two episodes of attempted improper command influence. The concurrent determinations by those courts do not warrant review by this Court. See, *e.g.*, *Doe* v. *United States*, 465 U.S. 605, 613-614 (1984). Moreover, petitioner had a full opportunity to demonstrate that Judge Reed was actually biased against him, but he failed to do so. Petitioner has offered no reason to doubt the findings below, so there is no need for this Court to revisit that fact-bound issue.[9]

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[8] See, *e.g.*, *United States* v. *Hilow*, 32 M.J. 439, 442-443 (C.M.A. 1991) (finding unlawful command influence was not harmless beyond reasonable doubt) ; *United States* v. *Thomas*, 22 M.J. 388, 394-397 (C.M.A. 1986) (finding unlawful command influence was harmless beyond a reasonable doubt), cert. denied, 479 U.S. 1085 (1987).

[9] Petitioner asserts that the trial court did not permit him to substantiate his claims, Pet. 8-9, but the military courts have already found otherwise, Pet. App. 10a-11a, 67b-89b, and there is no serious contention that they erred in this regard.

2. It is also settled that ex parte communications between the prosecutor and the trial judge do not constitute reversible error unless they result in prejudice to the accused.[10] Petitioner challenges the ex parte telephone conversation between Captain Powell and Judge Reed in which Captain Powell urged Judge Reed to adhere to the schedule set in petitioner's case, in order to reduce the cost of transporting the witnesses for petitioner's trial. That contact, however, did not prejudice petitioner. It is undisputed that the contact was brief; that the only subject mentioned by Captain Powell was the schedule for petitioner's trial; and that Judge Reed terminated the conversation after advising Captain Powell to leave such matters to the convening authority and to the government's trial counsel. Petitioner has not explained how that contact prejudiced the trial judge against him. Under these circumstances, the ex parte contact could not have affected the outcome of petitioner's court-martial.

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[10] See, *e.g.*, *Brown* v. *Dixon*, 891 F.2d 490, 496 (4th Cir. 1989), cert. denied, 110 S. Ct. 2220 (1990); *United States* v. *Napue*, 834 F.2d 1311, 1323 (7th Cir. 1987); *United States* v. *Earley*, 746 F.2d 412, 417 (8th Cir. 1984), cert. denied, 472 U.S. 1010 (1985); *United States* v. *Walsh*, 700 F.2d 846, 858 (2d Cir.), cert. denied, 464 U.S. 825 (1983); *Grieco* v. *Meachum*, 533 F.2d 713, 719 (1st Cir. 1976), cert. denied, 429 U.S. 858 (1976); *Glynn* v. *Donnelly*, 485 F.2d 692, 694 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); *Haller* v. *Robbins*, 409 F.2d 857, 860 (1st Cir. 1969). Cf. *Rushen* v. *Spain*, 464 U.S. 114, 119-121 (1983) (harmless error rule applied where judge communicated ex parte with juror).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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